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No. 650

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1954

THE STATE OF OKLAHOMA EX REL COMMISSIONERS
OF THE LAND OFFICE OF SAID STATE,
Petitioner,

VERSUS

MAGNOLIA PETROLEUM COMPANY,
a foreign corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,

FRED HANSEN,
First Assistant Attorney General,

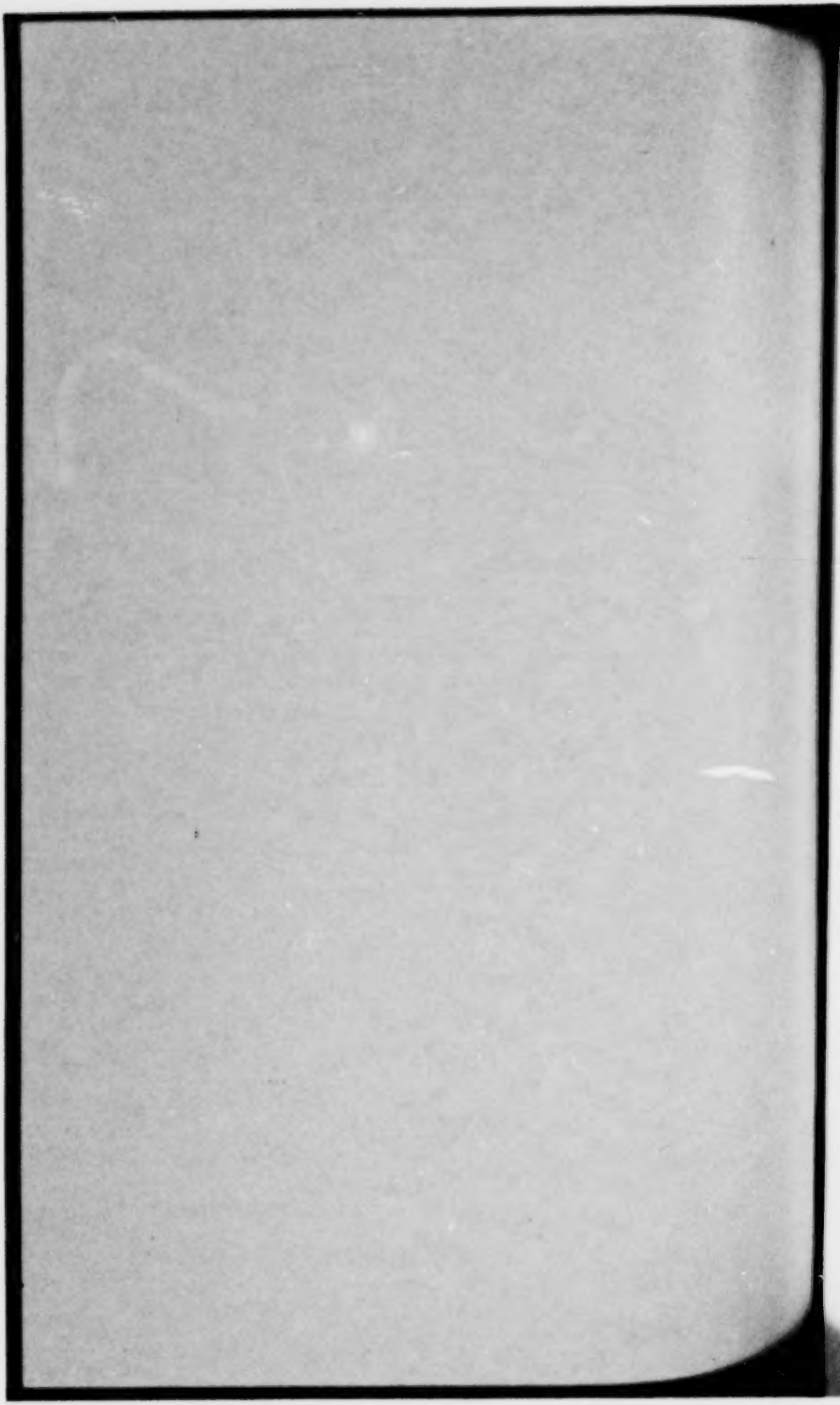
R. H. DUNN,
Attorney for Commissioners of the Land Office,

A. M. DEGRAFFENRIED,
Attorney for Commissioners of the Land Office,

Attorneys for Petitioner,
State Capitol Building,
Oklahoma City, Oklahoma.

March, 1955.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-6780



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In the
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No. .....

THE STATE OF OKLAHOMA EX REL COMMISSIONERS
OF THE LAND OFFICE OF SAID STATE,
Petitioner,

VERSUS

MAGNOLIA PETROLEUM COMPANY,
a foreign corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of Oklahoma ex rel Commissioners of the Land Office of said State prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled and numbered cause on the 30th day of August, 1954. Petitions for rehearing were denied February 11, 1955.

CITATIONS TO OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Western District of Oklahoma, Honorable Stephen S. Chandler,

District Judge, is unreported and is printed in Appendix A, *infra*. The opinion of the United States Court of Appeals for the Tenth Circuit, Murrah, Judge, with concurring opinion by Phillips, Judge, and dissenting opinion by Pickett, Judge, are unreported and are printed in Appendix A, *infra*, pages viii-xxiv. Order overruling petitions for rehearing is printed in Appendix A, *infra*, page xxiv.

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on the 30th day of August, 1954. Appendix A, *infra*, page vii.

Petitions for rehearing were denied on February 11, 1955, Appendix A, *infra*, page xxiv.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

Can a holder of a Certificate of Purchase of State lands by execution and delivery of a mineral deed (which was not approved by the State of Oklahoma), convey an interest in the minerals in such lands which must be recognized by the State?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of Oklahoma law are involved in this litigation:

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The Enabling Act (Sec. 8), approved June 16, 1906, 34 Stat. 272; Appendix B, *infra*, page xxv;

Oklahoma Constitution, Art. VI, Sec. 32; Art. XI, Sec. 1; Appendix B, *infra*, page xxvii;

Title 64, Okla. Stat. Ann., Sec. 191; Appendix B, *infra*, page xxvii;

Chap. 57, Session Laws of Oklahoma, 1923-1924; Appendix B, *infra*, page xxviii.

STATEMENT OF THE CASE

Upon the admission of the State of Oklahoma into the Union, the fee simple title to the tracts of land involved became vested in the State of Oklahoma, pursuant to an Act of Congress known as the "Enabling Act." These lands were a part of the original grant of lands to the State, which together with $5,000,000.00 in cash were to be held in trust for school purposes. The Constitution of Oklahoma provided that such lands and funds should be under the management and control of the Commissioners of the Land Office, and, through the years, special statutory provisions governing and regulating the manner of handling and disposing of such lands have been enacted by the State of Oklahoma.

B. J. Ebenkamp and Willis Tooley entered into contracts to purchase the land involved, which contracts were evidenced by agreements hereinafter called "Certificates of Purchase." The State retained legal title to secure the balance of the unpaid purchase price, with the agreement that a patent would issue upon payment of the full pur-

chase price, and that forfeiture would result from failure to make the annual deferred payments.

As holders of the Certificates of Purchase, Ebenkamp and Tooley executed mineral deeds to an undivided one-half interest in the minerals under the lands involved, ultimately assigned to the Magnolia Petroleum Company. The mineral deeds of conveyance were duly recorded in the Office of the County Clerk of Beaver County, Oklahoma, and photostatic copies of such deeds were furnished the Commissioners of the Land Office with the request such deeds be shown on the records of the Commissioners. The State of Oklahoma did not approve such conveyances, and received no consideration therefor.

Thereafter, upon default by Ebenkamp and Tooley, the State of Oklahoma, acting through the Commissioners of the Land Office served notice of cancellation of both certificates. Section 1, Ch. 57, 1923-1924 Session Laws provides notice of cancellation to be given "all delinquent purchasers or holders or owners of Certificate of Purchase." Section 2 provides service of the notice provided for in Section 1 shall be made "by registered mail to the record owner or lien holder of record and other person or persons in possession thereof." No notice of proposed cancellation was served upon the Magnolia Petroleum Company.

After cancellation of the Certificates of Purchase in 1936 and 1941, the State of Oklahoma went into, and has at all times since been in, possession of said lands.

In April of 1952, under the regulations prescribed by the State of Oklahoma, an oil and gas mining lease was offered for sale upon the full mineral interest under the

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lands involved, and a lease was purchased, at public sale, by The Carter Oil Company.

Thereafter, The Carter Oil Company instituted this action in the District Court against the Magnolia Petroleum Company, to quiet title to the oil and gas lease. Jurisdiction was based upon diversity of citizenship [28 U.S.C.A. § 1332(a)(1)]. Notwithstanding the refusal of the District Court to permit the State of Oklahoma to intervene on the ground that the State was not a citizen, and intervention would oust the court of original jurisdiction, the District Court did order the State of Oklahoma made a third party defendant on application of the Magnolia Petroleum Company, and overruled a motion to vacate such order.

The District Court held the mineral deeds executed by the holders of the Certificates of Purchase, not being approved by the State of Oklahoma in accordance with the applicable statutes and the terms of the Certificates of Purchase, did not convey to, or vest in, the Magnolia Petroleum Company any right, title or interest in and to said lands *as against the STATE OF OKLAHOMA:* and not having acquired any interest in the lands as against the State, the Magnolia Petroleum Company was not entitled to notice from the State of cancellation of the Certificates of Purchase under Ch. 57, Session Laws 1923-1924. The trial court concluded, therefore, that the cancellation of the Certificates of Purchase was in conformity with the applicable statutes and operated to forfeit all right, title and interest of the holders of the Certificates of Purchase, and all persons claiming by, through, or under them, in-

cluding the Magnolia Petroleum Company and upon such cancellation the STATE OF OKLAHOMA was revested with fee simple title to the lands in question, free and clear of any interest of the holders of the Certificates of Purchase and the Magnolia Petroleum Company.

The Court of Appeals reversed the trial court and held that the conveyances attempting to convey the mineral interest to the Magnolia Petroleum Company, were binding *as against the State of Oklahoma,* even though the State was not in privity under the purchase contract with the Magnolia Petroleum Company, did not approve the transfer of mineral rights to the Magnolia Petroleum Company, and received no consideration for such conveyance.

REASONS FOR GRANTING THE WRIT

(1) *The Court of Appeals has decided an important State question in a way which conflicts with applicable Oklahoma law.*

(2) *The lands involved in this action are a part of the lands granted by the United States to the State of Oklahoma, in trust, for school purposes, and the rule announced by the Court of Appeals violates and upsets years of administration and management, and clouds the title to and may result in the loss to the State of many thousands of acres of public lands.*

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(1)

The Court of Appeals has decided an important State question in a way which conflicts with applicable Oklahoma law.

As hereinbefore stated, the minerals which are the subject of this action are a part of the original grant of land by the United States Government to the State of Oklahoma in trust. The United States Government is the trustor, the State of Oklahoma is the trustee, and the schools and school children of the State of Oklahoma are the beneficiaries of the trust. If the decision of the Circuit Court of Appeals is permitted to stand, this property will be taken from the trustee and will likewise be taken from the trustor. In the case of *Board of County Commissioners of Woods County* v. *State ex rel Commissioners of the Land Office*, 126 Okla. 287, 259 Pac. 230, the Supreme Court of Oklahoma held the common school fund does not belong to the State but the State merely holds such funds in trust under the conditions of the Federal grant contained in the Enabling Act. The Court further holds the school funds were entrusted for the benefit of the common schools and the State pledged itself to hold such trust inviolate. The holding of the Court in this case is likewise applicable to the funds and assets created under Section 8 of the Enabling Act.

The administration of these public lands held in trust is governed solely under statutes enacted by the Legislature of the State of Oklahoma as authorized and directed by Section 8 of the Enabling Act and Art. VI, Sec. 32 of the Constitution of Oklahoma.

The statutes enacted by the State Legislature are enacted for and relate only to that purpose. Many of the things provided for in such enactments are of a summary nature and provide for acts and result in legal consequences contrary to many other well established principles that must give way.

In *Relf* v. *Thompson,* 188 Okla. 209, 107 P.2d 536, the Supreme Court of Oklahoma stated:

> "In Oklahoma the administration of the public lands entrusted to the Commissioners of the Land Office is governed entirely by statutes enacted for and relating only to that purpose. Many of the things therein provided for are of a summary nature and provide for acts and results in legal consequences contrary to many other well established principles that must give way."

In *Lucia* v. *Schaefer,* 109 Okla. 167, 233 Pac. 444, the Supreme Court of Oklahoma held that before the transfer of a Certificate of Purchase was binding on the State of Oklahoma, it must be approved by the Commissioners of the Land Office. Despite this opinion, the Court of Appeals held in this case that the transfer of an "interest" in the land by the holder of the Certificate of Purchase was binding on the State of Oklahoma, even though such transfer was not approved by the Commissioners of the Land Office. The effect of the Circuit Court's decision is that, therefore, where all the interest under a Certificate is assigned, the transfer must be approved by the Commissioners, but no approval is necessary if an interest less than the whole is assigned.

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There is no statute authorizing the sale of minerals in these lands separate and apart from the fee simple title, and the effect of the holding of the Court of Appeals is to approve a sale of mineral interests in these public lands without a statute authorizing such sale and without the consent of the State of Oklahoma. It permits the holder of a Certificate of Purchase to do indirectly what cannot be done directly by the Commissioners of the Land Office. *State ex rel Commissioners of the Land Office* v. *Armstrong et al.*, 199 Okla. 474, 188 P.2d 347.

In *Stevens* v. *Patten*, 174 Okla. 582, 50 P.2d 1106, the Supreme Court of Oklahoma held:

> "The purchaser is entitled to the possession, rents, and proceeds, and against all the world except the State, he is to be treated as the owner."

The decision of the Court of Appeals is to the contrary and, in effect, says that the holder of a Certificate of Purchase is entitled to possession, rents and profits, and against all the world, *including the State*, is to be treated as the owner.

The Magnolia Petroleum Company obtained no vested rights as against the State of Oklahoma by reason of the mineral deed and did not come into privity with the State of Oklahoma and was therefore not entitled to notice of the proposed cancellation.

A vested right is absolute, complete, and unconditional in itself. *State ex rel Wayne Co., et al.* v. *Hackmann, Auditor*, 199 S.W. 990. It is only vested rights that are protected by the due process clause. *Crump* v. *Guyer*, 60

Okla. 222, 157 Pac. 321; 12 Am. Jur., Sec. 650, page 340; *Pearsall* v. *Great Northern Ry. Co.*, 161 U.S. 646; *Campbell* v. *Holt*, 115 U.S. 620; *Anderson-Prichard Oil Corp.* v. *Corporation Commission*, 205 Okla. 672, 241 P.2d 363, appeal dismissed 342 U.S. 938; *Fahey* v. *O'Melveny & Myers*, 9 Cir., 200 F.2d 421, *cert. den.* 345 U.S. 952; *United States* v. *Nebo Oil Co.*, 5 Cir., 190 F.2d 1003; *Mizer* v. *Kansas Bostwick Irrigation District No. 2*, 172 Kan. 157, 239 P.2d 370; *Dunham Lumber Co.* v. *Gresz*, 71 N.D. 491, 2 N.W.2d 175; 11 Am. Jur.; Constitutional Law, Sec. 370.

The only right Magnolia obtained from the holder of the Certificate of Purchase was contingent upon the fulfillment of the terms of that contract, and no vested rights were created in Magnolia until the terms of that contract of purchase had been fulfilled. *Asher* v. *Hull*, 207 Okla. 478, 250 P.2d 866; *Stuart* v. *Westerheide*, 144 Okla. 150, 289 Pac. 721; *Seguin* v. *Maloney*, 198 Ore. 272, 253 P.2d 252; *Clinton* v. *Miller*, 142 Mont. 462, 226 P.2d 487; *Peterson* v. *Paulson*, 24 Wash.2d 166, 163 P.2d 830; *California Delta Farms* v. *Chinese American Farms*, 207 Cal. 298, 278 Pac. 227.

The Supreme Court of the State of Texas had under consideration a case wherein the facts were practically the same as the facts in this case. *Breen* v. *Morehead*, 136 S.W. 1407. In that case the Court said:

> "Where the state makes a contract for sale of public lands to R, and he conveyed an interest in the land to B, and afterwards the State forfeits such sale, and sells the land to another, and thereupon issues a patent to such other person, B, not being in privity with the state, may not attack the forfeiture, and through it the patent."

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In the case at bar, the Magnolia Petroleum Company was not in privity with the State and cannot be heard to complain or to attack the cancellation. See *Porter* v. *Barrett*, 206 N.W. 532; *Pierce & Stevenson* v. *Jones et al.*, 147 So. 842; *Scott* v. *Paisley*, 271 U.S. 632, 46 Sup. Ct. 591.

The Court of Appeals did not properly construe Sections 1 and 2, Ch. 57, 1923-1924 Session Laws of the State of Oklahoma.

Section 1 of the Act provides upon delinquency the Commissioners shall cause notice to be given all delinquent purchasers or holders or owners of Certificates of Purchase of the proposed cancellation. Section 2 provides for service of the notice by registered mail to the record owner or lien holder of record and to the person or persons in possession.

The words "record owner" as used in Section 2 of the Act can only refer back to the purchasers or holders or owners of Certificates of Purchase as used in Section 1. While the words "record owner" are very inept yet under normal grammatical construction these words being of general meaning can only refer to the specific words as contained in Section 1.

Section 1 is the substantive law while Section 2 is the procedural portion of the Act vitalizing and setting up the method or procedure of carrying into effect the substantive law of Section 1. Under the rule of *ejusdem generis* the words "record owner" as used in Section 2 cannot enlarge or diminish or change or qualify the substantive law of the preceding section. It cannot enlarge, change or qualify the wording "delinquent purchasers or holders or owners."

Bielke v. *American Crystal Sugar Co.*, 288 N.W. 584; *Board of County Commissioners of Kingfisher County* v. *Grimes et al.*, 75 Okla. 219, 182 Pac. 897; *Worley, Mayor,* v. *French*, 184 Okla. 116, 85 P.2d 296; *Skelton* v. *U. S.*, 88 F.2d 599.

The decision of the Court of Appeals erroneously construes the decision of the Supreme Court of Oklahoma in the cases of *Johnson* v. *Farmers Union Co-op Royalty Co.*, 205 Okla. 478, 238 P.2d 831, and *Berryman* v. *Producers Corp. of Nevada*, 206 Okla. 24, 240 P.2d 1111. In each of those cases, the holder of the Certificate of Purchase after conveying an undivided interest in the minerals, transferred the Certificate of Purchase. These mineral deeds were made without the knowledge, consent or acquiescence of the Commissioners of the Land Office and were not approved by the Commissioners of the Land Office. The transferee secured approval of the transfer and issuance of a patent in fee simple. A contest arose between the patentee and the mineral owner as to whether or not the mineral conveyance was effective and binding as against the patentee.

Notwithstanding that the facts are not identical, the Court of Appeals has construed the *Johnson* and *Berryman* cases, *supra*, as holding that a mineral conveyance by a certificate holder was binding against the State of Oklahoma, even though such mineral conveyance was not approved by the Commissioners of the Land Office. The issue in those cases as stated by the Supreme Court of Oklahoma was:

> "There is only one issue submitted. It is expressed in the simple question of whether or not the filing for

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> record of the mineral deed to plaintiffs in the office of the County Clerk * * * constituted constructive notice of plaintiffs' claim to the minerals * * *. If it did, plaintiffs were entitled to recover. If not, defendants should prevail."

The Court of Appeals obviously overlooked the fact that the State of Oklahoma was not a party in the *Johnson* and *Berryman* cases, and has erroneously construed such cases, and in so doing has decided a state question contrary to state law.

It is apparent that the decision of the Court of Appeals is contrary to the decision of the Oklahoma Supreme Court in *Lucia* v. *Schaefer, supra; Stevens* v. *Patten, supra; Johnson* v. *Farmers Union Co-op Royalty Co., supra,* and *Berryman* v. *Producers Corp. of Nevada, supra;* contrary to the long-established interpretation of the statutes by the Commissioners of the Land Office, and, in effect, takes from the State of Oklahoma the right to control the sale of public lands and approves the transfer of an interest in these public lands without statutory authority.

(2)

The lands involved in this action are a part of the lands granted by the United States to the State of Oklahoma, in trust, for school purposes, and the rule announced by the Court of Appeals violates and upsets years of administration and management, and clouds the title and may result in the loss to the State of many thousands of acres of public lands.

Where an administrative body has made an interpretation of an Act of the Legislature over a long period of time, such interpretation is entitled to great weight by the courts. *Skelly Oil Co.* v. *Jackson,* 194 Okla. 183, 148 P.2d 182; *Lincoln National Life Ins. Co.* v. *Read, Insurance Commissioner, et al.,* 194 Okla. 542, 156 P.2d 368; *First National Bank in St. Louis* v. *State of Missouri,* 263 U.S. 640, 45 Sup. Ct. 213, 68 Law Ed. 486.

During the time Ch. 57, Session Laws 1923-1924 was on the statute books, the Commissioners of the Land Office in the administration of these public lands construed the statutes as they were construed by the District Court and by the Supreme Court of Oklahoma in *Lucia* v. *Schaefer, supra,* and *Stevens* v. *Patten, supra.* The Commissioners consistently held that *as against the State of Oklahoma* the holder of a Certificate of Purchase could not convey an interest in the lands without the approval of the State. They have also consistently interpreted Sections 1 and 2, and particularly the wording in Section 2 "record owner", to refer back to the purchasers, holders, or owners of Certificates of Purchase. Under these interpretations the State cancelled approximately 1175 Certificates of Purchase covering some 214,260 acres of land. A hasty investigation discloses that approximately 350 of these cancellations,

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covering approximately 65,000 acres of land, involved a similar state of facts as are involved in this case. In many instances following the cancellation, the lands have been resold, and the question here involved concerns a great many more people than the estimated original 350 purchasers. The title to an estimated 65,000 acres of State lands has been clouded by the decision of the Court of Appeals. This statement of facts discloses how important this decision is to the State of Oklahoma and how far-reaching the effect of the decision is to the administration of public lands. This fact alone warrants the granting of the writ in this case.

The decision of the Court of Appeals has placed the State of Oklahoma in a most critical and precarious position in the administration of these public lands. If the decision is not reversed, the State of Oklahoma will lose title to thousands of acres of public lands and mineral rights of inestimable value.

SUMMARY AND CONCLUSION

As previously noted, the decision of the Court of Appeals is of extreme importance to the State of Oklahoma. In fact, it is difficult to paint a true picture of what the effect of the decision in this case, if not overruled, will have on the State School Fund and on the administration of the public lands of the State of Oklahoma.

As stated heretofore, from the first day of January, 1924, the effective date of Ch. 57, 1923-1924 Session Laws, to December 31, 1941, the year the Certificates of Purchase involved were cancelled, the State of Oklahoma cancelled

1175 Certificates of Purchase for non-payment. Approximately 214,260 acres of land were involved in these cancellations. It is estimated approximately 350 of these Certificates involved the same state of facts as are involved in this case. The title to more than 65,000 acres of land has been clouded.

Following cancellation of these Certificates of Purchase, the State of Oklahoma went into possession of the land, and has asserted ownership over it. In many instances the State of Oklahoma has resold the land and issued patents therefor, and now a great many more than the 350 tracts or persons are involved. If the decision of the Court of Appeals stands, then the title to all these lands is clouded.

Western Oklahoma is one large potential oil and gas field. Drilling and explorations are taking place all over the western part of the State where mineral interests which at the time Tooley and Ebenkamp attempted to alienate the one-half interest, were practically valueless, are now very valuable and bring large sums of money per acre.

If the decision of the Court of Appeals is not reversed, it will be little less than a disaster to the State of Oklahoma and to this trust fund. After this length of time, title to these lands should be put at rest and not be upset and clouded. Equity always seeks to confirm and put titles at rest. It would take years to settle and clear the title to all the lands involved, with great expense and consequent loss to this trust fund. The loss which will result from this decision is incalculable, and this matter is of the greatest importance to the State of Oklahoma.

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We submit, therefore, a compelling case is presented for the exercise of this Court's certiorari jurisdiction.

If certiorari is granted, we shall ask this Court to set aside the judgment of the Court of Appeals, to affirm the judgment of the District Court, and to approve the procedure that the Legislature of Oklahoma has established for the management and sale of public lands.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,

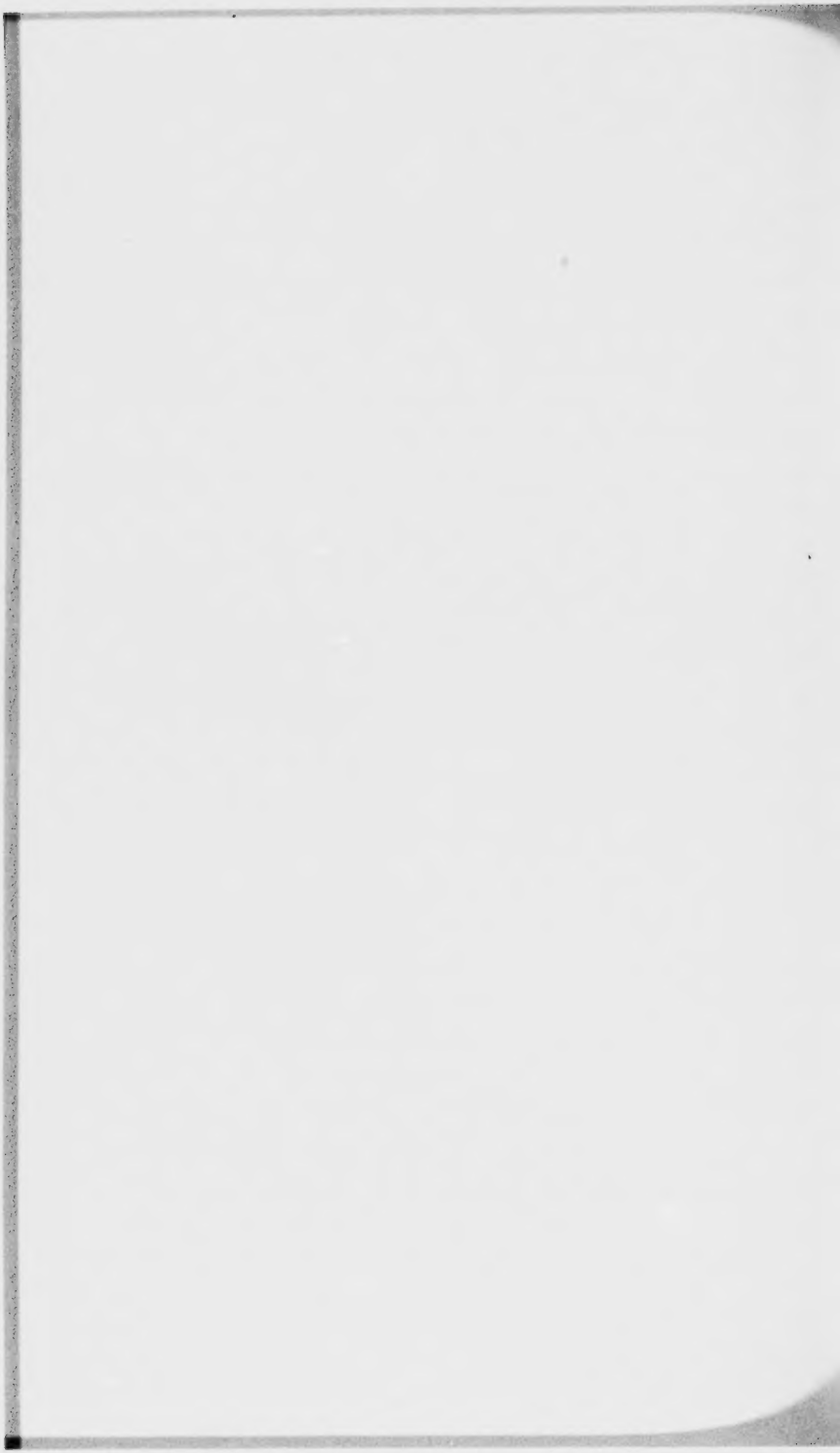
FRED HANSEN,
First Assistant Attorney General,

R. H. DUNN,
Attorney for Commissioners of the Land Office,

A. M. DEGRAFFENRIED,
Attorney for Commissioners of the Land Office,

Attorneys for Petitioner,
State Capitol Building,
Oklahoma City, Oklahoma.

March, 1955.



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APPENDIX A

Magnolia Petroleum Co.,

vs.

The Carter Oil Co. et al.

Transcript of Record—Filed January 25, 1954, pp. 89-94.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE

Findings of Fact

For its Findings of Fact the Court adopts the Stipulation of Facts filed hereon on October 2, 1953, and Stipulation of Facts No. 2 filed herein on October 19, 1953, and Stipulation of Facts No. III filed herein on October 27, 1953, and also makes the following additional Findings of Fact:

(1) Immediately following the order of forfeiture of September 15, 1941, the State of Oklahoma entered into, and has ever since been in, the sole and exclusive possession of the SE/4 and SW/4 of Section 33, Township 6 North, Range 23 East of the Cimarron Meridian, Beaver County Oklahoma, holding the same to the exclusion of the Magnolia Petroleum Company and all other persons.

(2) Immediately following the order of forfeiture of March 4, 1936, the State of Oklahoma entered into, and has ever since been in, the sole and exclusive possession of the E/2 of NW/4 of the S/2 of NE/4 of Section 32, Township 6 North, Range 23 East of the Cimarron Meridian, Beaver County, Oklahoma, holding the same to the exclusion of the Magnolia Petroleum Company and all other persons.

[APPENDIX A]

Conclusions of Law

The Court makes the following Conclusions of Law:

(1) This Court has jurisdiction of the subject matter of this action, and of the parties thereto.

(2) As to the SE/4 and SW/4 of Section 33-6N-23ECM, Beaver County Oklahoma:

(a) Upon the issuance of the Certificate of Purchase to B. J. Ebenkamp under date of November 12, 1926, equitable title to the lands above described became vested in the said B. J. Ebenkamp. The Mineral deeds thereafter executed, not being approved by the Commissioners of the Land Office, did not convey to, or vest in, the Magnolia Petroleum Company any right, title or interest in and to said lands, as against the State of Oklahoma.

(b) On May 31, 1941, the said B. J. Ebenkamp was in default in the payments required to be made pursuant to said Certificate of Purchase, and the State of Oklahoma was privileged, under the terms of such Certificate of Purchase, to cancel such Certificate of Purchase. Under the provisions of Chapter 57, Session Laws 1923-24, the State of Oklahoma was required to give notice only to the holder of such Certificate of Purchase, B. J. Ebenkamp. No notice of cancellation of such Certificate of Purchase was required to be, and none was, served upon the Magnolia Petroleum Company. The notice of cancellation of such Certificate of Purchase as served upon B. J. Ebenkamp on May 31, 1941, was sufficient and fully met the requirements of this statute.

(c) Thereafter, and on September 15, 1941, B. J. Ebenkamp, the holder of the Certificate of Purchase, still being in default in the payments due thereunder, the Commissioners of the Land Office duly issued an order of forfeiture of such Certificate of Purchase which order of forfeiture was in keeping with the applicable statutes of the State

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of Oklahoma, and fully and completely forfeited all right, title and interest of said Certificate holder, and any and all persons claiming by, through, or under him in and to the lands involved, including the Magnolia Petroleum Company, and the State of Oklahoma had the fee simple title to the surface and all the minerals in and under said lands, free and clear of any interest of said Certificate holder and the Magnolia Petroleum Company.

(3) As to the E/2 of NW/4 and S/2 of NE/4 of Section 32-6N-23 ECM, Beaver County, Oklahoma:

(a) Upon the issuance of the Certificate of Purchase of Willis Tooley under date of May 9, 1930, equitable title to the lands *above* described became vested in the said Willis Tooley. The mineral deeds thereafter executed, not being approved by the Commissioners of the Land Office, did not convey to, or vest in, the Magnolia Petroleum Company any right, title or interest in and to said lands, as against the State of Oklahoma.

(b) On September 16, 1935, the said Willis Tooley was in default in the payments required to be made pursuant to said Certificate of Purchase, and the State of Oklahoma was privileged, under the terms of such Certificate of Purchase, to cancel such Certificate of Purchase. Under the provisions of Chapter 57, Session Laws 1923-24, the State of Oklahoma was required to give notice only to the holder of such Certificate of Purchase, Willis Tooley. No notice of cancellation of such Certificate of Purchase was required to be, and none was, served upon the Magnolia Petroleum Company. The notice of cancellation of such Certificate of Purchase as served upon Willis Tooley on September 16, 1935, was sufficient and fully met the requirements of this statute.

(c) Thereafter, and on March 4, 1936, Willis Tooley, the holder of the Certificate of Purchase, still being in default in the payments due thereunder, the Commission-

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ers of the Land Office duly issued an order of forfeiture of such Certificate of Purchase, which order of forfeiture was in keeping with the applicable statutes of the State of Oklahoma, and fully and completely forfeited all right, title and interest of said Certificate holder, and any and all persons claiming by, through, or under him in and to the lands involved, including the Magnolia Petroleum Company, and the State of Oklahoma had the fee simple title to the surface and all the minerals in and under said lands, free and clear of any interest in said Certificate holder and the Magnolia Petroleum Company.

(4) The failure of the statutes to require notice to the Magnolia Petroleum Company under the facts in this case, and the failure of the State of Oklahoma to give notice of the intended cancellation of said Certificate of Purchase to the Magnolia Petroleum Company, did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, or the Constitution of the State of Oklahoma, because Magnolia Petroleum Company had acquired no rights as against the State of Oklahoma and, hence, lost none thereby.

(5) On April 7, 1952, the State of Oklahoma was the owner in fee simple and in possession of all the lands hereinabove described, and on said date made, executed and delivered to The Carter Oil Company oil and gas mining leases covering the same, which said leases covered all the oil, gas, and other minerals in and under said lands, and said leases are now valid and subsisting and in full force and effect.

(6) Subsequent to the dates of the orders of forfeiture, to-wit: September 15, 1941, and March 4, 1936, the Magnolia Petroleum Company did not, and does not now, have any right, title, or interest in and to the lands hereinabove described, and the plaintiff is entitled to have its title to the oil and gas mining leases covering said lands quieted

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as against the Magnolia Petroleum Company, and the State of Oklahoma is entitled to have its title quieted as against the Magnolia Petroleum Company.

Decree

Based upon the foregoing Findings of Fact and Conclusions of Law, it, by the Court,

Ordered, Adjudged and Decreed.

(1) That the Court has jurisdiction of the subject matter of this action and of the parties hereto.

(2) On April 7, 1952, the State of Oklahoma was, and now is, the owner and in possession of the fee simple title to the following described lands located in Beaver County, Oklahoma, to-wit: E/2 of NW/4 and S/2 of NW/4 of Section 32, and SE/4 and SW/4 of Section 33, all in Township 6 North, Range 23 East of the Cimarron Meridian, and the defendant, Magnolia Petroleum Company, has no right, title, claim, lien, or interest in and to such lands.

(3) On April 7, 1952, the State of Oklahoma made, executed and delivered to the plaintiff, The Carter Oil Company, oil and gas mining leases covering the lands above described, which leases are valid and subsisting and cover all the oil, gas and other minerals in and under said lands above described.

(4) That the defendant, Magnolia Petroleum Company, and all persons claiming by, through, or under it, be, and they are hereby, perpetually enjoined and forbidden from claiming any right, title, or interest in and to the premises above described adverse or hostile to the possession and title of The Carter Oil Company in and to the oil and gas mining leases dated April 7, 1952, covering said lands, and said Magnolia Petroleum Company, and all persons claiming by, through, or under it, are hereby perpetually forbidden and enjoined from commencing suit to

disturb The Carter Oil Company and its said possession and title to said oil and gas mining leases covering said lands, and from setting up any claim or interest adverse to the title of The Carter Oil Company therein, and from disturbing The Carter Oil Company in its peaceable and quiet possession of said described premises.

(5) That the defendant, Magnolia Petroleum Company, and all persons claiming by, through, or under it, be, and they are hereby, perpetually enjoined and forbidden from claiming any right, title, or interest in and to said premises by virtue of the mineral deeds hereinabove described adverse or hostile to the possession and title of the State of Oklahoma, and are hereby perpetually forbidden and enjoined from commencing any suit to disturb the State of Oklahoma in its possession and title to said premises, and from setting up any claim or interest adverse to the State of Oklahoma therein, and from disturbing the State of Oklahoma in its peaceable and quiet possession of the premises above described.

(6) The costs of this action are taxed to the defendant, Magnolia Petroleum Company.

Enter: 11/5/1953.

STEPHEN S. CHANDLER, JR.
United States District Judge.

Filed November 6, 1953.

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[APPENDIX A]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Magnolia Petroleum Company)
v.) No. 4801
The Carter Oil Company & State of Oklahoma)
ex rel Commissioners of the Land Office)

Appeal from the United States District Court for the Western District of Oklahoma

Before PHILLIPS, Chief Judge, and MURRAH and PICKETT, Circuit Judges.

MURRAH, Circuit Judge.

Magnolia Petroleum Company appeals from a judgment quieting title in the Commissioners of the Land Office of the State of Oklahoma as the owner of the fee simple title and in The Carter Oil Company as the owner of oil and gas leases executed to it by the Commissioners covering land forfeited to the Commissioners by defaulted certificate of purchase holders. Magnolia counterclaimed to the quiet title action instituted by Carter, interpleading the Commissioners as third-party defendants, contending that as the record owner of one-half of the minerals under the forfeited land without notice of the forfeiture, it was entitled to have its title quieted as against Carter and the Commissioners.

The controverted property is part of the original Oklahoma school land grant placed under the control of the Commissioners. Enabling Act, June 16, 1906, c. 3335, § 7, 34 Stat. 272; Okla. Const. Art. 6, § 32. By mesne conveyances B. J. Ebenkamp and Willis Tooley obtained equitable title to the land from the Commissioners, evidenced by Certificates of Purchase. The State retained legal title to secure the balance of the unpaid purchase price with the understanding that a patent would issue upon payment

of the full purchase price and that forfeiture would result from failure to make annual deferred payments. Title 64 O.S. § 187 (R.L. 1910, § 7152; Laws 1916, ch. 36, p. 96, § 2; Laws 1933, ch. 91, p. 163, §7); *Stevens* v. *Patten, et al.*, 50 P.2d 1106 (Okla.); Ch. 57, S.L. Okla. 1923-24; *Dale* v. *Deal*, 14 P.2d 363 (Okla.).

As holders or owners of certificates of purchase, Ebenkamp and Tooley executed mineral deeds to an undivided one-half of the minerals under the land, ultimately assigned to Magnolia by mesne conveyances dated June 26, 1930. These deeds were recorded in Beaver County where the land was located.

Thereafter, upon default by Tooley, the Commissioners on September 16, 1935, served notice of cancellation upon Tooley and his lien holder; and on May 31, 1941, the Commissioners served notice of cancellation upon Ebenkamp and his party in possession, as provided by Ch. 57, S.L. 1923-24, §§ 1 and 2. No notice of cancellation of the certificates of purchase was served upon Magnolia, and it had no actual knowledge of cancellation until Carter requested quit-claim deeds covering the minerals. Magnolia refused to quit claim on the grounds that it had claimed title to the minerals since 1930, and this quiet title action ensued.

The trial Court held that the mineral deeds executed by certificate holders Ebenkamp and Tooley, not being approved by the Commissioners of the Land Office in accordance with § 191 O.S. Title 64 (R.L. 1910 § 7156; Laws 1910-11, ch. 44, p. 87 § 1; Laws 1915, ch. 210 § 8) and the terms of the certificates of purchase, did not convey to or vest in Magnolia any right, title or interest in the lands as against the State of Oklahoma; and not having acquired any interest in the lands, Magnolia was not entitled to notice of cancellation under §§ 1 and 2 of Ch. 57, S.L. of Okla., 1923-24. It concluded therefore that cancellation of the certificates, being in conformity with the applicable

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statutes, operated to forfeit all right, title and interest of the certificate holders and any and all persons claiming by, through or under them, including the Magnolia Petroleum Company; that upon such forfeiture the State of Oklahoma was revested with the fee simple title to the lands in question free and clear of any interest of the certificate holders and Magnolia, and that Carter acquired valid oil and gas leases from the State of Oklahoma after forfeiture.

§ 191 O.S. Title 64, under which the original certificates of purchase were issued, provides in material part:

> "Any purchaser of lands under the provisions of this act shall have the right to transfer or assign all his rights, title and interest in and to such lands * * *; provided, before delivery of patent, such assignment, to be valid, shall be duly recorded in a proper book, kept for that purpose by the Commissioners of the Land Office; * * * Upon the sale and transfer of the interest of a holder of a certificate of purchase in and to the land covered thereby, if the same is approved by the Commissioners of the Land Office, and upon the payment of any principal or interest due to date of transfer, and the surrendering of the certificate of purchase transferred, the Commissioners of the Land Office shall issue and deliver to the transferee a new certificate of purchase upon the execution by the transferee of a new certificate of purchase note for the deferred payments, and the note, executed by the holder of the certificate of purchase transferred, shall be cancelled and surrendered to him."

On the reverse side of the certificates issued in pursuance of the statute appears a transfer certificate to be signed by the transferors showing that they do "assign * * * all of (their) right, title and interest" in the lands described in the Certificate, "said transfer and sale being made subject to the approval and acceptance of the Commissioners of the Land Office of the State of Oklahoma."

[APPENDIX A]

In construing the statute as applying to a conveyance of the mineral interests by the certificate holders and requiring the approval of the Commissioners, the Trial Court construed the critical word "all" as including any part of the interest of the certificate holder; and thus concluded that "approval and acceptance of the Commissioners of the Land Office" was a prerequisite to the validity of the conveyance of a lesser interest than the whole. The Trial Court's conclusions in this respect are buttressed by evidence in the record to the effect that for at least seven or eight years preceding the trial it had been the policy of the Commissioners of the Land Office not to recognize the validity of a conveyance of any interest in the lands covered by a certificate of purchase unless the same was accepted and approved by the Commissioners of the Land Office in accordance with the terms of the certificate.

Absent any other authoritative interpretation of the state statute, we should of course be prone to give great weight to the administrative interpretation, *Great Northern Life Ins. Co.* v. *Read*, 136 F.2d 44 (10 Cir., 1943); reversed on another point, 322 U.S. 47, 88 L. Ed. 1121, 64 S.C. 873; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 220 P.2d 279, 290, especially in view of the affirmation of the learned Trial Court. But we think the interpretation placed upon this statute by recent decisions of the Supreme Court of Oklahoma renders the administrative interpretation of the statute untenable.

Berryman v. *Producers Corp.*, 240 P.2d 1111 and *Johnson* v. *Farmers Union Co-Op Royalty Co.*, 238 P.2d 831 leave no doubt that § 191 O.S. Title 64 is applicable only to a conveyance by a certificate holder of " 'all his rights, title and interest' in the land, which is equivalent to an assignment of the certificate of purchase," *Berryman* v. *Producers Corp., supra,* at Page 1113, and that the statute is inapplicable to a conveyance of less than all of his right, title and interest in the land; that the recording of a conveyance

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of a mineral interest by a certificate holder in the county where the land is located is constructive notice and binding as against all those claiming under reissued certificates of purchase after assignment or forfeiture. And this is so although the mineral conveyance was not approved or accepted by the Commissioners of the Land Office as provided in the statute and the certificates of purchase.

Indeed Appellees concede as much. They suggest, however that the Commissioners of the Land Office were not a party to the proceedings in either the *Johnson* or the *Berryman* case, and earnestly contend that the construction placed upon § 191 in those cases was not intended to apply with binding effect on the State of Oklahoma.

True, the Commissioners of the Land Office were not parties to the proceedings in the *Johnson* and *Berryman* cases, but we think there can be no doubt that the rule of those cases has equal application to the Commissioners. To hold otherwise would result in the anomalous and wholly untenable situation in which one claiming under a reissued certificate would have good title against all in the chain of title except the source. We cannot believe that the Oklahoma court intended any such incongruous statutory construction.

If § 191 leaves a certificate holder free to convey less than all of his interest in the land without the approval of the Commissioners there can be no warrant or authority for saying that the approval of the Commissioners is requisite to the validity of a conveyance which is valid against all other holders under the certificate issued by the Commissioners. In other words, if the statute is inapplicable to the conveyance, it can grant no authority in the Commissioners to require their consent and approval therefor, and a record of such conveyance in the county where the land is located is constructive notice to the Commissioners as well as all other parties. We are constrained to hold that

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Magnolia acquired an undivided one-half interest in the minerals under the lands involved here and that the recording of the mineral deeds in the county where the land is located is constructive notice to all parties, including the Commissioners of the Land Office.

The question remains whether the cancellation of the certificate of purchase without notice to Magnolia operated to divest it of its mineral interests in the lands covered by such certificates.

§ 1 of Ch. 57, S. L. Okla., 1923-24 provides in substance that when any person, firm or corporation holding a certificate of purchase to any public lands in the State of Oklahoma shall be in default of any annual deferred payments due the State for a period of two years, the Commissioners of the Land Office shall cause notice to be given to "all delinquent purchasers, or holders or owners of certificates of purchase," that if the delinquent deferred payments are not paid within ninety days from the date of service of such notice, the Commissioners of the Land Office shall declare "all rights obtained by the purchaser or transferee under said sale and the certificate of purchase issued thereon forfeited to the State." § 2 of the act provides in material part that, "The service of the notice provided for in the foregoing section shall be made by registered mail, to the record owner, or lien holder of record and to the person or persons in possession thereof."

The Trial Court construed these two sections together to mean that the State of Oklahoma was required to give notice only to the holders or owners of certificates of purchase and that no notice of cancellation of such certificates of purchase was required to be given to the Magnolia Petroleum Company.

Magnolia takes the position on appeal that the "record owner" referred to in § 2 on whom service of notice pro-

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vided for in the foregoing section shall be made, is to be taken in its ordinary accepted meaning, and when so construed necessarily includes the Magnolia Petroleum Company whoses interests were duly recorded in the county where the land was situated; and that any other construction would amount to a taking of its property without due process of law. In short, Magnolia would construe the words "record owner" in § 2 as referring to someone in addition to the delinquent purchasers, holders or owners of certificates of purchase in § 1.

Invoking the rule of *ejusdem generis*, Appellees say that § 2 merely provides for the service of the notice to be given in § 1 and that the general term "record owner" in § 2 should not be construed to enlarge or amplify the specific class designated as purchasers or holders or owners of certificates of purchase in § 1; that as a cognate term of those words, it should be confined to those persons so designated. It is also said that as trustees of vast acreage held for the benefit of the school children of Oklahoma, the Commissioners of the Land Office were not intended to be burdened with the search of the records to determine outstanding interests and notifying all of the holders thereof; that these considerations prompted the legislature to provide an expeditious quasi-judicial procedure for the cancellation of the certificates of delinquent certificate holders or owners. The Commissioners call attention to the fact that they conveyed no interest to Magnolia and received no consideration therefor; that Magnolia took the mineral interests subject to the statutes governing the issuance and cancellation of the certificates of purchase, and all Magnolia acquired was a defeasible equitable interest subject to forfeiture with the cancellation of the certificates of purchase; that the burden was upon Magnolia to see that the payments were made by the certificate holders in order to protect their interests.

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It is significant to note that in 1943 the Oklahoma Legislature amended §§ 1 and 2, Ch. 57, S.L. Okla., 1923-24 to consolidate the two sections and to provide for service of notice of forfeiture upon, "The lawful owner of a certificate of purchase contract, his heirs, executors, administrators, devisees, trustees and assigns." Under the present act Magnolia would undoubtedly be entitled to service of notice of cancellation, and the Commissioners of the Land Office would thus be required to search the records. The amendment of the statute to require service on the assignees of the holders or owners of the certificates of purchase is susceptible of a legislative recognition of the failure of the prior legislation to so provide. Sutherland Statutory Construction, 3rd Edition, § 1930 and § 5110, with cases cited, 50 Am. Jr., Statutes, § 275, p. 262. It might also be taken as a legislative recognition of a neglected duty to accord due process of law to the owner of a vested interest in the forfeited lands. II Am. Jr., Constitutional law, § 151, pp. 832-3.

The use of the words "record owner" in § 2 to refer to the persons on whom service provided for in § 1 shall be served, admittedly "inept", is sufficiently ambiguous to justify resort to extraneous considerations for the ascertainment of their meaning, 50 Am. Jr., Statutes, § 225, pp. 204-6; Sutherland Statutory Construction, 3rd Edition, §§ 4502-3. And we should have no great difficulty agreeing with the contentions of the Appellees and the construction placed upon the words "record owner" by the Trial Court were it not for the serious constitutional considerations of due process which that construction poses.

The Trial Court had no difficulty with due process because of its conviction that Magnolia acquired no property interest to constitutionally protect. But having decided that Magnolia did acquire a vested property right, we are

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now faced with the necessity of determining whether a taking of that right without notice can be reconciled with due process of law.

In this posture we are brought to the salutary canon of construction under which courts faced with two constructions of a statute, one of which would comport with its constitutionality, the other of which would cast doubt, the court should always presume that the legislature intended the observance of all constitutional requirements. This is especially true where vested property rights are sought to be forfeit under the statute to be construed. 11 Am. Jr., Constitutional Law, § 97, pp. 725-32, with cases cited in extensive footnotes; Merrill on Notice, § 543, p. 562; *Foster* v. *Marshall*, 284 Pac. 882.

The procedure provided in the statutes for the cancellation of certificates and the forfeiture of equitable interests evidenced thereby, although born of expediency and nurtured by the administrative hand, is nevertheless quasi-judicial in its character, *Dale* v. *Deal*, 14 P. 2d 363; *Wilhite* v. *Cruce*, 172 Pac. 962; and the constitutional requirements for procedural due process are no less exacting. When "the administrative body acts judicially, notice and an opportunity for hearing are indispensable to due process," Merrill on Notice, § 517, p. 506; and the spirit of the law requires that all doubts concerning due process should be resolved in favor of notice. Merrill on Notice, § 543, p. 562.

It is no distortion to construe the words "record owner" as meaning all parties having an interest of record. It comports procedural due process; it respects the time-honored rule against forfeitures; and we are constrained to so construe it.

Appellees also deny Magnolia's claim of right in the property on the ground that the Commissioners have ad-

versely held the property for the statutory period of fifteen years. 12 O.S.A. § 93(4). It was stipulated that the State of Oklahoma caused the controverted lands to be shown upon the tax rolls of the county where the land was located as its land and collected and retained the rents and profits therefrom. But the title to the minerals has been severed as a separate estate and the Trial Court found that they had not been developed for oil and gas purposes. Mere possession of the surface by the State without assertion of dominion over the minerals does not constitute adverse possession of the minerals. *Noble* v. *Kahn*, 240 P. 2d 757.

The judgment is reversed and remanded with directions to accord Magnolia the right of redemption.

Magnolia Petroleum Co.)
v.) No. 4801
Carter Oil Co.)

PHILLIPS, Chief Judge, concurring:

I fully concur in the opinion of Judge Murrah. However, I desire to state what appear to me to be additional reasons for holding that the deeds in Magnolia's chain of title were valid against and binding upon the Commissioners of the Land Office,[1] and an alternative reason for holding that Magnolia was a "record owner" within the meaning of § 5492 Okla. Stat. 1931 and entitled to be given the notice provided for in § 5491 Okla. Stat. 1931.

Magnolia delivered to the Commissioners the original and one copy of each of the several deeds in its chain of title and the filing fees for recording them in the office of the Commissioners. All of such deeds were filed for record in the office of the Commissioners in 1930, long before the

[1] Hereinafter referred to as the Commissioners.

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proceedings for cancellation were instituted by the Commissioners.

A certificate of purchase vests in the holder of the certificate equitable title to the lands conveyed by the certificate, with the right to possess, use, and enjoy the lands.[2]

The State retained the mere legal title, with a lien on the land to secure the deferred payments and the right to forfeit the certificate holder's rights in the event of default in payment of the deferred payments. 64 Okl. St. Anno. § 187.

64 Okl. St. Anno. § 191 provides:

> "Any purchaser of lands under the provisions of this act shall have the right to transfer or assign all his rights, title and interest in and to such lands, and such assignment shall be in form and executed and acknowledged as required under the laws governing conveyances; provided, before delivery of patent, such assignment, to be valid, shall be duly recorded in a proper book, kept for that purpose by the Commissioners of the Land Office; and provided, further, that where the purchaser of such lands has a husband or wife, such husband or wife shall join in the assignment of any such contract. Upon the sale and transfer of the interest of a holder of a certificate of purchase in and to the land covered thereby, if the same is ap-

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[2] *Stevens* v. *Patten,* 174 Okl. 582, 50 P.2d 1106, 1110, and cases there cited;

Johnson v. *Farmers Union Co-op Royalty Co.,* 205 Okl. 578, 238 P.2d 831.

Berryman v. *Producers Corp. of Nevada,* 206 Okl. 24, 240 P.2d 1111, 1112;

First National Bank of Butler v. *Welch,* 119 Okl. 270, 250 P. 100, 102;

State v. *Red River Lumber Co.,* 109 Minn. 185, 123 N.W. 412, 413.

proved by the Commissioners of the Land Office, and upon the payment of any principal or interest due to date of transfer, and the surrendering of the certificate of purchase transferred, the Commissioners of the Land Office shall issue and deliver to the transferee a new certificate of purchase upon the execution by the transferee of a new certificate of purchase note for the deferred payments, and the note, executed by the holder of the certificate of purchase transferred, shall be canceled and surrendered to him."

The last sentence, which contains the clause, "if the same is approved by the Commissioners of the Land Office," was added by an amendatory act of 1910-1911. That sentence also incorporates amendments made in 1915, which are not here material.

Thus, it will be seen that before the 1910-1911 amendment a purchaser of state lands had "the right to transfer or assign all his rights, title and interest in and to such lands," and the only conditions imposed were that the assignment should be in the form and executed and acknowledged as required by the laws covering conveyances, and that in order to be valid the assignment should be in the form and executed and acknowledged as required by the laws covering conveyances, and that in order to be valid the assignment must be recorded prior to the delivery of patent in a proper book, kept for that purpose by the Commissioners. No approval by the Commissioners was essential to validity.

The last sentence of § 191, *supra*, does not make approval by the Commissioners essential to validity, but essential only if the original certificate is to be surrendered, the original certificate note covering deferred payments canceled, and a new certificate note executed by the purchaser and a new certificate of purchase delivered to the purchaser. As stated by the Supreme Court of Oklahoma,

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the last sentence "refers to the manner and method of transfer of the purchaser's interest where the assignee of the certificate of purchase assumes payment of deferred payments and executed a new certificate of purchase note."[3] The reason for approval in such cases is obvious. There is a complete novation and a discharge of the original debtor. The State has the right to determine whether it will accept a new debtor in place of the old and release the latter.

It is true that § 191, *supra*, if literally construed, would apply only to transfers of "all the rights, title and interest" of the certificate holder. However, it is a well-settled principle, frequently applied to grants of authority or definitions of right, that "*Major continet in se minus.*" (The greater includes the less within itself.)[4]

And in a recent case, *Stevens* v. *Patten*, 174 Okl. 582, 50 P.2d 1106, the Oklahoma Supreme Court expressly held that a certificate holder had the right under § 9331, C.O.S. 1921 (§ 191, *supra*) to convey an undivided interest in the minerals in the land covered by the certificate of purchase.

It is my conclusion that under § 191, *supra*, the holder of a certificate may transfer an undivided interest by an instrument executed and acknowledged as required by the Oklahoma statutes governing conveyances, and that such assignment is valid if duly recorded in a book kept for that purpose by the Commissioners, prior to delivery of patent, and that approval of an assignment under such section by the Commissioners is only necessary when there is a release of the original certificate note, cancellation of the original certificate, the execution of a new certificate note by the assignee and the issuance of a new certificate of purchase to the assignee.

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[3] *First National Bank of Butler* v. *Welch*, 119 Okl. 270, 250 P. 100, 101.

[4] Bouvier's Law Dictionary, Rawle's Third Revision, Vol. 2, p. 2144.

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For the additional reasons indicated above, it is my opinion that the mineral deeds through which Magnolia claims were valid and binding on the State of Oklahoma; and that, if recording of the deeds in Magnolia's chain of title in the county real estate records did not constitute it a record owner within the meaning of § 5492, *supra*, then the recording of such deeds in the office of the Commissioners constituted Magnolia a record owner within the meaning of § 5492, *supra*, and entitled it to the notice provided for in § 5491, *supra*.

No. 4801.

PICKETT, Circuit Judge, dissenting.

In Oklahoma, when school lands are sold under deferred payment contracts, the legal title remains in the State, but the equitable title is conveyed to the purchaser who is entitled to the possession, rents, and profits. He is the owner against the world, except the State. *Stevens* v. *Patten*, 174 Okl. 582, 50 P.2d 1106. He becomes the owner of the land, subject to the lien of the State for the deferred payments. 65 Okl. St. Ann. Sec. 187; *First Nat. Bank of Butler* v. *Welch*, 119 Okl. 270, 250 P. 100. He may convey by deed an undivided interest in the land which is good against anyone acquiring legal title to the lands thereafter, if the deed has been duly recorded in the county where the land is located. *Stevens* v. *Patten*, *supra*. He may mortgage the land and one thereafter taking an assignment of the contract takes it subject to the mortgage lien if the latter has been properly recorded. *Winter* v. *Schneider*, 120 Okl. 299, 251 P. 609. He may by deed convey the minerals in and under the lands and the deed is good, if it has been duly recorded, against a subsequent assignee of the contract who has surrendered the original contract and obtained a re-issue thereof. *Berryman* v. *Producers Corp.*

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of Nevada, 206 Okl. 24, 240 P.2d 1111; *Johnson* v. *Farmers Union Co-op Royalty Co.*, 205 Okl. 478, 238 P.2d 831. In all of these cases the conveyances by the purchaser were upheld, but in all of them the terms of the contract had been fulfilled and the contract owner was entitled to a patent.

It is apparent from the Oklahoma decisions that when school lands are sold under deferred payment contracts, the relation between the State, the contract owners, and those who acquire rights through the owners, is substantially the same as though the State were a private citizen and had sold the property by a contract of sale. It is conceded here that there was a default in the terms of the contracts and that all the rights of the original contract owners and their assignees were cancelled out. Magnolia held a deed to one-half the mineral rights in and under the lands which had been executed by the owner of the contract before cancellation. This deed had been duly recorded, and Magnolia contends that the State could not cancel its interests without notice. If Magnolia is not entitled to notice of cancellation under the statute or the contract, its rights were lost when the contract was cancelled because whatever interest it acquired in the property came through the contract. Magnolia was not in privity with the State and its remedies were limited to its transaction with the certificate holder.

Section 1 of Chapter 57 of the Session Laws of Oklahoma, 1923-4, provided that when a holder of a certificate of purchase shall be in default of deferred payments for a certain period, the Commissioners of the Land Office shall, "cause notice to be given all delinquent purchasers, or holders or owners of certificates of purchase". It further provided that if such delinquent payments were not paid within ninety days from the date of the service of the notice, the Commissioners, "shall declare all rights obtained by the purchaser or transferee under said sale and

the certificate of purchase issued thereon, forfeited to the State." It will be noted that this section referred only to the notice which was to be given to delinquent purchasers, or holders or owners of certificates of purchase. Section 2 of the same Act dealt with the service of the notice which was required under Section 1, and stated that such notice, "shall be made by registered mail, to the record owner, or lien holder of record and to the person or persons in possession thereof." It is evident that these sections were designed to provide a simple and expeditious method of clearing the state's title to school land upon a default in the conditions of outstanding certificates of purchase by the certificate holders. Nowhere in the statute is there any indication that one acquiring an interest in the lands from the certificate holder is entitled to notice unless we construe the term "record owner" as used in Section 2 as applying to everyone who has recorded a conveyance. This would place upon the Land Commissioners the burden of searching the record before cancellation and serving notice upon all who appeared to have acquired an interest in the lands regardless of the nature of their interest.[1] I think that if the Legislature had had this in mind it would have said so. Such a statutory construction, it appears to me, is a reasonable one, particularly when to hold otherwise will overturn an administrative interpretation of almost thirty years. Such administrative interpretation should be given

[1] During the trial the District Court made this observation:

"Now, if you can take this conveyance of half interest, Mr. Ebenkamp can convey each acre to a different person. So when the State of Oklahoma, when the certificate holder hasn't paid, goes to foreclose, they had to notify three hundred and twenty people. It would be practically impossible for them to foreclose their mortgage.

"In other words, this is a contract and it is a personal matter between the Commission and the man that they give it to. There are a lot of provisions as to who they can even do business with and they certainly, under the statute, have a right to choose their person or see that he meets certain requirements equally with all other citizens."

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great weight by the courts and should not be overturned without cogent reasons. *Skelly Oil Co.* v. *Jackson*, 194 Okl. 183, 148 P. 2d 182; *Lincoln National Life Insurance Co.* v. *Read, et al.*, 194 Okl. 542, 156 P. 2d 368, aff'd. 325 U.S. 673.

The fact that the owner of a mineral deed has good title against everyone except the State does not create an anomalous or untenable situation, because he cannot obtain a complete title until the obligations to the State under the contract are fulfilled.

Such an interpretation does not have any constitutional inhibitions. All rights obtained through the owner of the contract are contingent upon the fulfillment of the terms of that contract, and no vested interests are created in third parties in the property until the terms of the contract have been fulfilled. *Asher* v. *Hull*, 207 Okl. 478, 250 P. 2d 866; *Stuart* v. *Westerheide*, 144 Okl. 150, 289 Pac. 721; *Sequin* v. *Maloney*, 198 Ore. 272, 253 P. 2d 252; *Clinton* v. *Miller*, 124 Mont. 463, 226 P. 2d 487; *Peterson* v. *Paulson*, 24 Wash. 2d 166, 163 P. 2d 830; *California Delta Farms* v. *Chinese American Farms*, 207 Cal. 298, 278 Pac. 227, appeal dismissed, 280 U.S. 520.

Only vested rights are protected by the Due Process Clause of the Constitution. 12 Am. Jur., Constitutional Law, Sec. 650. Magnolia had no vested right as against the state. Whatever title it had was contingent upon the performance of the contract by the certificate holder. See *Pearsall* v. *Great Northern Ry. Co.*, 161 U.S. 646; *Campbell* v. *Holt*, 115 U.S. 620; *Anderson-Prichard Oil Corp.* v. *Corporation Commission*, 205 Okl. 672, 241 P.2d 363, appeal dismissed 342 U.S. 938; *Crump* v. *Guyer*, 60 Okl. 222, 157 Pac. 321; *Fahey* v. *O'Melveny & Myers*, 9 Cir., 200 F. 2d 420, *cert. den.* 345 U.S. 952; *United States* v. *Nebo Oil Co.*, 5 Cir., 190 F. 2d 1003; *Mizer* v. *Kansas Bostwick Irrigation District No. 2*, 172 Kan. 157, 239 P. 2d 370; *Dunham Lumber*

Co. v. *Gresz,* 71 N.D. 491, 2 N.W. 2d 175; 11 Am. Jur., Constitutional Law, Sec. 370.[2]

For the reasons stated, I would affirm the judgment.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Magnolia Petroleum Company, a Texas corporation, Appellant,	)	Appeal from the United States District Court for the Western District of Oklahoma
4801 v.	)	
The Carter Oil Company, a West Virginia corporation, et al., Appellees.	)	

This cause came on to be heard on the petitions of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petitions be and the same are hereby denied.

(Entered February 11, 1955.)

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[2] In *United States* v. *Nebo Oil Co., supra,* the court said:

"True, there is no rule or principle known to our system of the law whereby private property can be taken from one person and conveyed to another for his private use and benefit. It is equally true that remedial legislation frequently has an effect upon the control and disposition of property. The principal restriction upon legislation of this nature appears to be that vested rights must not be disturbed. But many rights, privileges and immunities having to do with ownership under a specific state of the law, cannot be regarded as vested rights. To be a vested right it must have become a title, legal or equitable, to the present or future use and enjoyment of property."

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APPENDIX B

Okla. Stat. 1951, Enabling Act, Sec. 8, p. 36:

"§ 8. University, *etc.*, grants—Allotments—Use of lands and proceeds—Lands for public institutions and buildings—Mineral and oil lands.—That section thirteen in the Cherokee Outlet, the Tonkawa Indian Reservation and the Pawnee Indian Reservation, reserved by the President of the United States by proclamation issued August nineteenth, eighteen hundred and ninety-three, opening to settlement the lands, and by any Act or Acts of Congress since said date and section thirteen in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State for the use and benefit of the University of Oklahoma and the University Preparatory School, one-third; of the normal schools now established or hereafter to be established, one third; and of the Agricultural and Mechanical College and the Colored Agricultural Normal University, one-third: The said lands or the proceeds thereof as above apportioned shall be divided between the institutions as the Legislature of said State may prescribe: Provided, That the said lands so reserved or the proceeds of the sale thereof shall be safely kept or invested and held by the said State and the income thereof, interest, rental or otherwise, only shall be used exclusively for the benefit of said educational institutions. Such educational institutions shall remain under the exclusive control of said State and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or the income or rentals thereof, shall be used

for the support of any religious or sectarian school, college or university.

"That section thirty-three, and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and Acts for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the Legislature of said State may prescribe.

"Where any part of the lands granted by this Act to the State of Oklahoma are valuable for minerals, gas and oil, such lands shall not be sold by the said State prior to January first, nineteen hundred and fifteen; but the same may be leased for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong, and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: Provided, however, That agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith. June 16, 1906, c. 3335, § 8, 34 Stat. 273."

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Okla. Stat. 1951, Constitution of the State of Oklahoma, Art. XI, § 1:

"§ 1. Acceptance of grants and donations—Pledge of faith of state.—The State hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act, and any other Acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated; and the faith of the State is hereby pledged to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated."

Constitution of the State of Oklahoma, Art. VI, § 32:

"COMMISSIONERS OF THE LAND OFFICE

"§ 32. Membership and functions—The Governor, Secretary of State, State Auditor, Superintendent of Public Instruction, and the President of the Board of Agriculture, shall constitute the Commissioners of the Land Office, who shall have charge of the sale, rental, disposal, and managing of the school lands and other public lands of the State, and of the funds and proceeds derived therefrom, under rules and regulations prescribed by the Legislature."

O.S. 1951, Title 64, § 191, p. 432:

"§ 191. Transfer of purchaser's rights—Issuance of new certificate to transferee.—Any purchaser of lands under the provisions of this act shall have the right to transfer or assign all his rights, title and interest in and to such lands, and such assignments shall be in form and executed and acknowledged as required under the laws governing conveyances; provided, before delivery of patent, such assignment, to be valid,

shall be duly recorded in a proper book, kept for that purpose by the Commissioners of the Land Office; and provided, further, that where the purchaser of such lands has a husband or wife, such husband or wife shall join in the assignment of any such contract. Upon the sale and transfer of the interest of a holder of a certificate of purchase in and to the land covered thereby, if the same is approved by the Commissioners of the Land Office, and upon the payment of any principal or interest due to date of transfer, and the surrendering of the certificate of purchase transferred, the Commissioners of the Land Office shall issue and deliver to the transferee a new certificate of purchase upon the execution by the transferee of a new certificate of purchase note for the deferred payments, and the note, executed by the holder of the certificate of purchase transferred, shall be canceled and surrendered to him. R.L. 1910, § 7156; Laws 1910-11, ch. 44, p. 87, § 1; Laws 1915, ch. 210, § 8."

Acts of Legislature, Special Session 1924, Ch. 57 pp. 69-71:

"School Lands—Certificates of Purchase—Delinquency.

"Section 1. Any person, firm or corporation holding a certificate of purchase to any tract, piece or parcel of any public lands of the State of Oklahoma or contract of purchase, who shall be in default of any annual deferred payment or payments due the State, or taxes due the State, County, or other municipality, for a period of two years, the Commissioners of the Land Office shall, within six (6) months after the passage and approval of this Act, cause notice to be given all delinquent purchasers, or holders or owners of certificates of purchase, that if such delinquent deferred payments, taxes, or past due payments are not paid within ninety (90) days from the date of the service

of such notice, the Commissioners of the Land Office shall declare all rights obtained by the purchaser or transferee under said sale and the certificate of purchase issued thereon, forfeited to the State. If the amounts due are not paid within 90 days from the date of the serving of such notice, all rights obtained under such sale and the certificate of purchase issued thereon, shall be declared forfeited and the certificate of purchase declared cancelled, and shall be cancelled, and the lands therein described, and all appurtenances thereunto belonging, together with all monies paid down and deferred payments made, shall revert to the State, the same as though no such sale had ever been made. The order making such forfeiture shall be spread upon the records of the Commissioners of the Land Office.

"Same—Notice—Appeals.

"Section 2. The service of the notice provided for in the foregoing section shall be made by registered mail, to the record owner, or lien holder of record and to the person or persons in possession thereof. In event the postoffice or the address of the purchaser or transferee of said land be unknown, the notice shall be published in two consecutive issues of some weekly newspaper published in or of general circulation in the county where the land is situated. The forfeiture shall be entered by the Commissioners of the Land Office after ninety (90) days from the date of the first publication of said notice, or service of registered notice. Provided, that any purchaser or transferee may within thirty (30) days from the date of said order of forfeiture, appeal from said order to the district court of the county wherein said lands are located by serving legal notice of appeal upon the Secretary of the Commissioners of the Land Office, and executing a

good and sufficient bond to the State of Oklahoma in the amount due the Land Office and the rents and profits thereof. Said bond to be approved by the Secretary of the Commissioners of the Land Office, and conditioned as provided by law, but in no event will the State of Oklahoma be liable for the costs of said appeal."

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HAROLD B. WILLEY, CL

No. 650

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

THE STATE OF OKLAHOMA EX REL COMMISSIONERS OF THE LAND OFFICE OF SAID STATE,
Petitioner,

VERSUS

MAGNOLIA PETROLEUM COMPANY,
a corporation,
Respondent.

REPLY BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

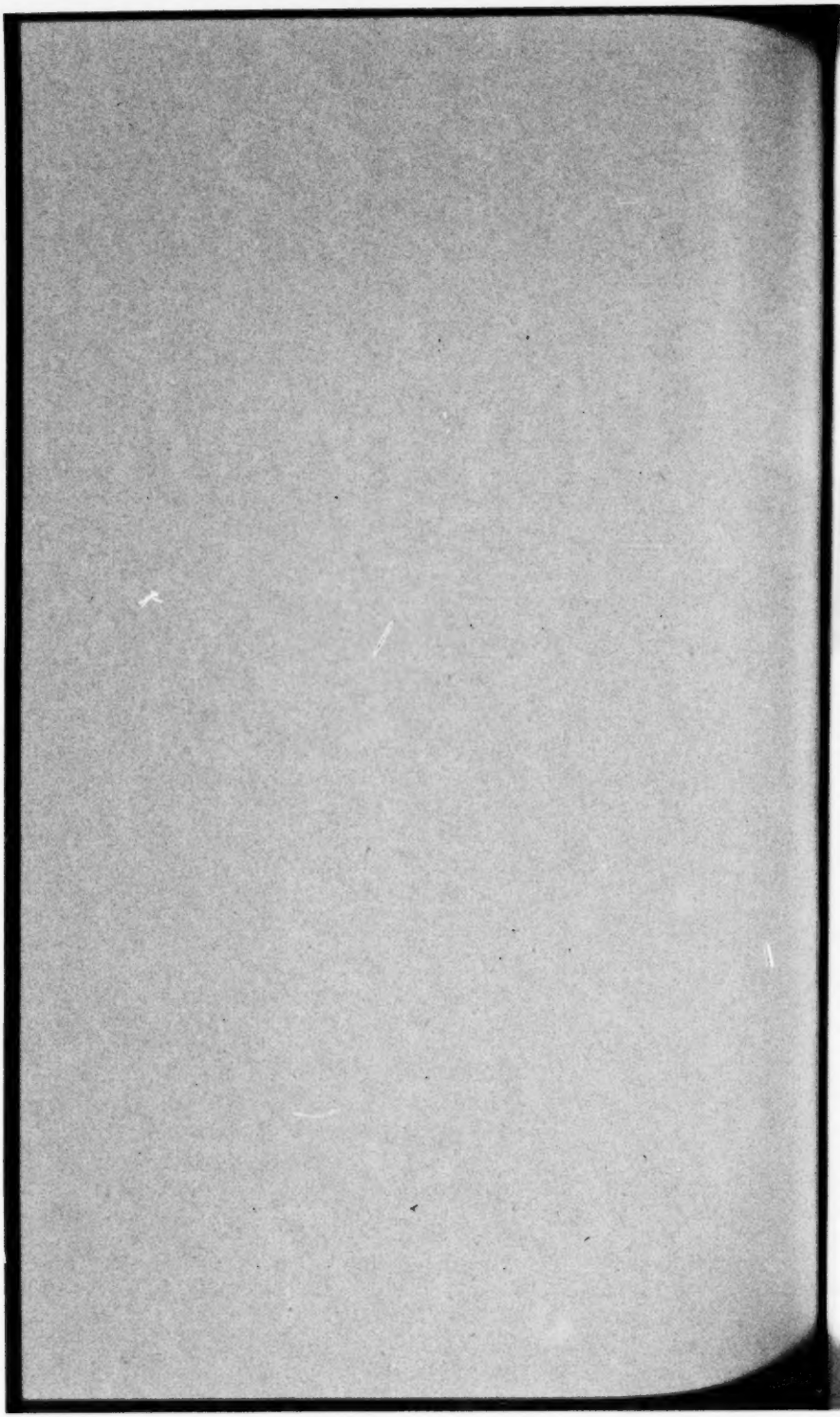
EARL A. BROWN,
CHAS. B. WALLACE,
Dallas, Texas;

JAMES E. HORIGAN,
P. O. Box 1828,
Oklahoma City 1, Oklahoma,

Attorneys for Respondent,
Magnolia Petroleum Company.

April, 1955.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 8-8780



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In the
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THE STATE OF OKLAHOMA EX REL COMMISSIONERS OF THE LAND OFFICE OF SAID STATE,
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VERSUS

MAGNOLIA PETROLEUM COMPANY,
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Respondent.

REPLY BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

THE COURT OF APPEALS HAS DECIDED LOCAL QUESTIONS IN A WAY NOT IN CONFLICT WITH APPLICABLE STATE LAW.

The petitioner, State of Oklahoma *ex rel* Commissioners of the Land Office of said State, requests the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on August 30, 1954. Their petition for rehearing, together with that of The Carter Oil Company, was denied on February 11, 1955. The Land Commissioners of Oklahoma urge certiorari and review on the ground that the

Court of Appeals decided the question of mineral ownership in conflict with state law. The majority and concurring opinions of the court below, printed at pages vii-xxi in Appendix A to the petition for certiorari and brief filed herein, clearly set forth the applicable Oklahoma statutes and decisions relied upon for entering judgment in favor of respondent, Magnolia Petroleum Company.

Prior to the time respondent purchased mineral rights in the controverted lands from holders of certificates of purchase contracts with the State of Oklahoma, the Land Commissioners of said State had, pursuant to statutory authority, sold and conveyed said lands and vested equitable title thereto in favor of the certificate holders, who had full right to the possession, use, and enjoyment of the lands, and the State retained bare legal title only to secure the unpaid balance of the purchase price. *Stevens* v. *Patten*, 174 Okla. 582, 50 P.2d 1106, 1110, and cases there cited; *Johnson* v. *Farmer's Union Co-op. Royalty Co.*, 205 Okla. 578, 238 P.2d 831; *Berryman* v. *Producers Corp. of Nevada*, 206 Okla. 24, 240 P.2d 1111, 1112; *First National Bank of Butler* v. *Welch*, 119 Okla. 270, 250 P.2d 100, 102; *State* v. *Red River Lumber Co.*, 109 Minn. 185, 123 N.W. 412, 413.

Long prior to cancellation of their respective certificates, the equitable title owners, Tooley and Ebenkamp, sold and conveyed the mineral rights in question to respondent. Petitioner concedes that Tooley and Ebenkamp had such an interest in the land that they could sell undivided mineral interests to third persons. In fact, the Oklahoma Supreme Court has expressly held that certificate holders have the right to convey mineral rights

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in the land covered by a certificate of purchase. *First National Bank of Butler* v. *Welch, supra; Johnson* v. *Farmer's Union Co-op. Royalty Co., supra; Berryman* v. *Producers Corp. of Nevada, supra.*

Even though the respondent's mineral deeds, prior to cancellation of the certificates, were duly and regularly filed of record, both in the county wherein the land is situated and in the Office of the Land Commissioners of Oklahoma, the petitioner has contended herein that there is no evidence that it had approved or recognized the conveyances. In this respect, it is urged that an administrative practice of long standing had rendered such approval necessary in order to bind the State of Oklahoma. As a basis for the administrative interpretation, the petitioner relies upon 64 Okla. Stats., Sec. 191, which provides as follows:

> "Any purchaser of lands under the provisions of this act shall have the right to transfer or assign all his rights, title and interest in and to such lands, and such assignment shall be in form and executed and acknowledged as required under the laws governing conveyances; provided, before delivery of patent, such assignment, to be valid, shall be duly recorded in a proper book, kept for that purpose by the Commissioners of the Land Office; and provided, further, that where the purchaser of such lands has a husband or wife, such husband or wife shall join in the assignment of any such contract. Upon the sale and transfer of the interest of a holder of a certificate of purchase in and to the land covered thereby, if the same is approved by the Commissioners of the Land Office, and upon the payment of any principal or interest due to date of transfer, and the surrendering of the certificate of purchase transferred, the Commissioners of the

> Land Office shall issue and deliver to the transferee a new certificate of purchase upon the execution by the transferee of a new certificate of purchase note for the deferred payments, and the note, executed by the holder of the certificate of purchase transferred, shall be canceled and surrendered to him. R.L. 1910, Sec. 7156; Laws 1910-11, ch. 44, p. 87, Sec. 1; Laws 1915, ch. 210, Sec. 8."

The Court of Appeals correctly held, consistent with applicable Oklahoma decisions, that an approval by the Commissioners under such statute is necessary only when there is a release of the original certificate note, cancellation of the original certificate, the execution of a new certificate note by the assignee and the issuance of a new certificate of purchase to the assignee. As noted in the majority opinion in the Court of Appeals, the interpretation placed upon this statute by decisions of the Supreme Court of Oklahoma renders the administrative interpretation untenable. *Berryman* v. *Producer's Corp., supra,* and *Johnson* v. *Farmer's Union Co-op. Royalty Co., supra,* leave no doubt that the statute is applicable only to a conveyance by a certificate holder of "all his right, title and interest in the land, which is equivalent to an assignment of the certificate of purchase", *Berryman* v. *Producer's Corp., supra,* at page 113, and that the statute is inapplicable to a conveyance of less than all of his right, title and interest in the land, whether or not approved by the Land Commissioners. While the petitioner was not a party in the *Berryman* or *Johnson* cases, the unqualified interpretation and plain meaning of this statute by the Oklahoma

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Supreme Court can leave no doubt that the rule of those cases has equal application to the Commissioners.

The proceedings whereby the Land Commissioners cancelled the certificates of purchase of Tooley and Ebenkamp were quasi-judicial in character and required notice under Chapter 57, Session Laws of Oklahoma, 1923-24, Sections 1 and 2, applicable at the time of cancellation. Failure to have given notice to the certificate holders would, of course, have rendered the proceedings a nullity. *Dale* v. *Deal*, 159 Okla. 111, 14 P.2d 263. Section 2 of the 1923-24 Session Laws of Oklahoma, above noted, further requires that notice of cancellation be given to the "record owner, lien holder of record and the party or parties in possession." By the same token that a party in possession or a lien-holder might not necessarily be a certificate holder or owner referred to in the preceding Section 1, a record owner could be any person having a recognized interest of record, such as the respondent herein, who had duly recorded its mineral deeds. The Court of Appeals was manifestly correct in construing the "record owner" entitled to notice of cancellation under the statute as including the respondent. While the Oklahoma Supreme Court has never construed the term, yet, under somewhat similar statutes, the term has been universally construed by other state courts in the same manner as by the Court of Appeals in this case. *Okanogan Power & Irrigation Co.* v. *Quackenbush*, 107 Wash. 651, 182 Pac. 618; *Hunt* v. *State*, 110 Tex. 204, 217 S.W. 1034; *Godfrit* v. *Judd* (Colo.), 182 P.2d 907. See, also, Vol. 36, "Words and Phrases", at page 559; Vol. 1, Merrill on Notice, Sec. 560, at page 589.

In construing the term, the Court of Appeals was not unmindful of the ruling of the Oklahoma Supreme Court that forfeitures of state school lands are frowned upon and are to be strictly construed against the Land Commissioners and in favor of notice. See *Dale* v. *Deal, supra; Miller* v. *Frampton,* 100 Okla. 115, 227 Pac. 890. Furthermore, the Court of Appeals held that respondent's mineral rights were vested under Oklahoma law and that such an interpretation should be given the statute which would comport with the constitutional requirements of due process of law.

Being a "record owner" entitled to notice under the Oklahoma statute, the petitioner's contention that respondent was not entitled to notice of forfeiture of its rights, due to lack of privity of contract with the State of Oklahoma, is untenable. The statute itself compelled the giving of notice to respondent.

II.

LACK OF A SUBSTANTIAL QUESTION OF GENERAL PUBLIC CONCERN.

Having decided that respondent was entitled to notice of forfeiture of the certificate of purchase contracts in accordance with statutory requisites, hereinabove discussed, the Court of Appeals found it unnecessary to predicate its judgment upon the constitutional questions raised respecting the requirements of notice under the due process clauses of the Fourteenth Amendment to the Constitution of the United States of America and Article II, Section 7, of the Constitution of the State of Oklahoma. In this pos-

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ture, the petition for certiorari filed herein does not disclose necessary review concerning any Federal constitutional or statutory question.

Petitioner urges that review should be granted on the ground that the rule announced by the Court of Appeals upsets years of administration and management of the public lands of the State of Oklahoma. As noted hereinabove, the Court of Appeals concluded that the interpretation placed upon 64 Okla. Stats., Section 191, by recent decisions of the Supreme Court of Oklahoma renders the administrative interpretation untenable. *Berryman* v. *Producers Corp.*, 240 P.2d 111, and *Johnson* v. *Farmer's Union Co-op. Royalty Co.*, 238 P.2d 831. The judicial construction of the statute is not new. In *First National Bank of Butler* v. *Welch* (1925), 119 Okla. 270, 250 Pac. 100, the Oklahoma Supreme Court, referring to that part of the statutory provision relating to approval of conveyances, said:

> "The balance of the section refers to the manner and method of transfer of the purchaser's interest where the assignee of the certificate of purchase assumes payment of deferred payments and executes a new certificate of purchase note."

There is no evidence herein that the Commissioners had promulgated or prescribed any rule or regulation requiring approval by them of a sale of a part of the certificate holder's interest in order to validate such a sale.

Where an administrative construction is manifestly wrong or clearly erroneous, it is not to be followed by the courts, but is to be rejected. *Jewell Ridge Coal Corp.* v. *Local No. 6167, U.M.W.*, 325 U.S. 161, 65 Sup. Ct. 1063, 89

L. Ed. 1534, rehearing denied in 325 U.S. 897, 65 Sup. Ct. 1550, 89 L. Ed. 2007. There is an absence of any evidence in this case as to administrative practice at the time of the cancellation of the certificates in question. Many years had elapsed and the testimony of petitioner's witness in the trial court, Mr. Lee, was to the effect that during the period of time he has served as an employee of the Commission (1947 to 1954) that approval has been the required policy of the Land Commissioners. The trial proceedings reflect reference made to changes in the form and provisions of certificates of purchase. It is not disclosed as to whether the present adopted policy of the Commissioners results from an interpretation of the plain language of the present form of certificate requiring that the Commissioners give their approval in writing to a sale by a certificate holder of a part of his fee simple title.

Respectfully submitted,

EARL A. BROWN,
CHAS. B. WALLACE,
Dallas, Texas;

JAMES E. HORIGAN,
P. O. Box 1828,
Oklahoma City 1, Oklahoma,

Attorneys for Respondent,
Magnolia Petroleum Company.

April, 1955.

FILED
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Respondent.

RESPONSE OF PETITIONER TO REPLY BRIEF OF RESPONDENT

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
First Assistant Attorney General;

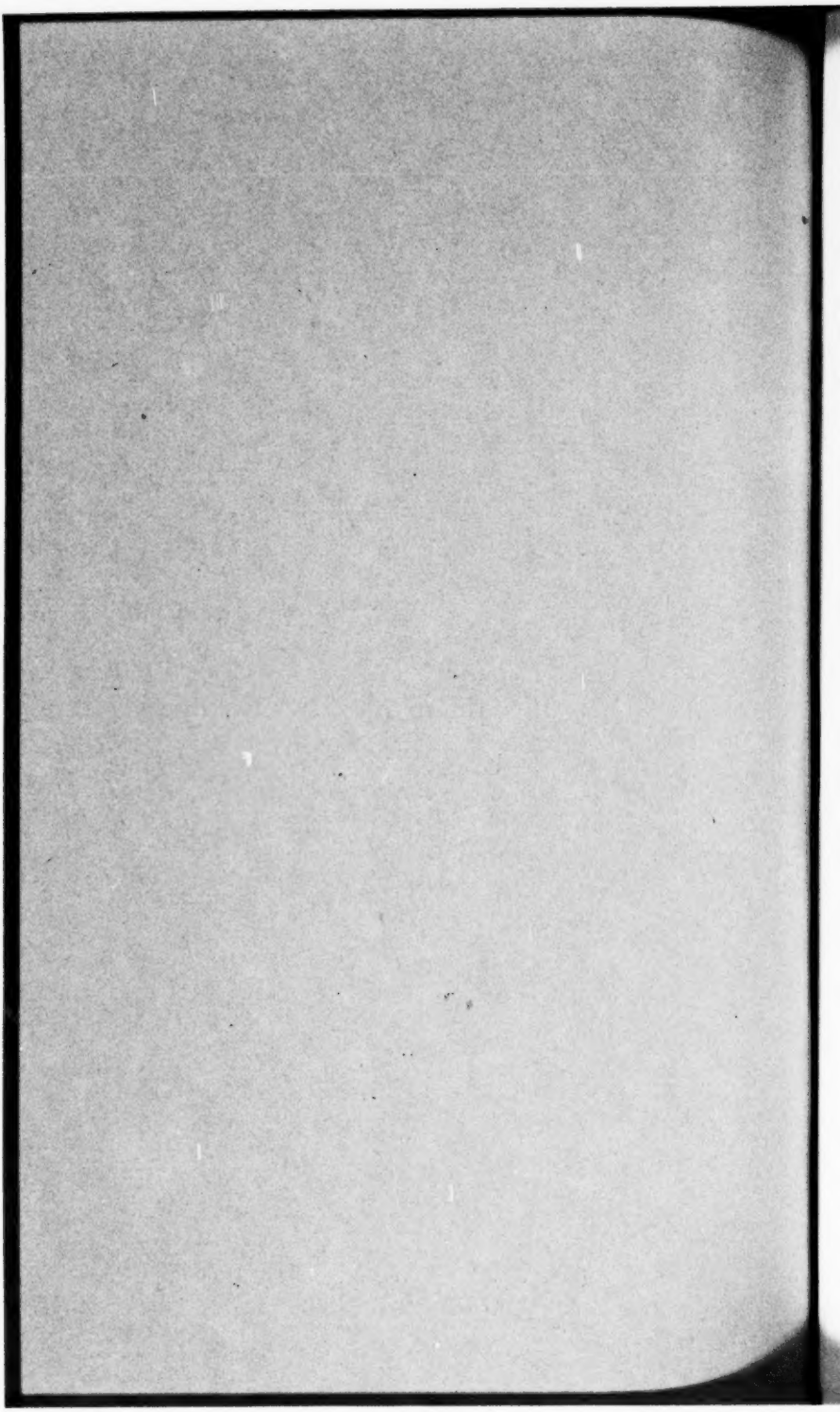
R. H. DUNN,
Attorney for Commissioners of the Land Office;

A. M. DEGRAFFENRIED,
Attorney for Commissioners of the Land Office,

Attorneys for Petitioner,
State Capitol Building,
Oklahoma City, Oklahoma.

April, 1955.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750



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MAGNOLIA PETROLEUM COMPANY, a corporation,
Respondent.

RESPONSE OF PETITIONER TO REPLY BRIEF OF RESPONDENT

It is believed further discussion of the three cases relied upon by the respondent, Magnolia Petroleum Company, and which cases formed the basis upon which the United States Court of Appeals, Tenth Circuit, based their opinion, will be of assistance to the Court in determining whether the Writ of Certiorari should be granted.

The case of *Johnson* v. *Farmers Union Co-Operative Royalty Company*, 205 Okla. 478, 238 P.2d 831; *Berryman* v. *Producers Corporation of Nevada*, 206 Okla. 24, 240 P.2d 1111; and *Stevens* v. *Patten*, 174 Okla. 582, 50 P.2d 1106, are the cases which the appellant contends were miscon-

strued in the majority opinion and which apparently are the basis for the majority opinion.

In the State of Oklahoma the syllabus is the law of the case. Title 12, Sec. 977, Okla. Stat. 1951. This has been upheld and approved by the Supreme Court of the State of Oklahoma in the case of *Corbin* v. *Wilkinson,* 175 Okla. 248, 57 P.2d 45. With this statute and the decision of the Supreme Court of the State of Oklahoma in the *Corbin* case, *supra,* in mind, we call the Court's attention to the syllabus in the case of *Johnson* v. *Farmers Union Co-Operative Royalty Company, supra:*

> " 'Constructive notice' is a creation of statute. Compliance with sec. 16, Title 16, O.S. 1941, by recording an instrument affecting title to real property in the county where land is situated constitutes constructive notice of such instrument, and all subsequent purchasers are charged with notice thereof.
>
> "Mineral deed conveying minerals in state school land and certificate of purchase from Land Office, recorded in office of county clerk of county in which land was situated, constituted constructive notice to purchaser taking assignment of certificate of purchase and securing patent covering entire interest in land."

The syllabus in the *Berryman* case is the same as that in the *Johnson* case except the word "thereafter" appears in the second syllabus of the *Berryman* case following the word "purchaser."

To further bolster our position that neither the *Johnson* nor *Berryman* cases are applicable to the facts and the law in the case at bar, we call the Court's attention to an

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excerpt from the *Johnson* case which appears on page 832 of the Pacific Reporter citation:

> "There is only one issue submitted. It is expressed in the simple question of whether or not the filing for record of the mineral deed to plaintiffs in the office of the county clerk of Harmon county constituted constructive notice of plaintiff's claim to the minerals in the SE/4 SW/4. If it did, plaintiffs were entitled to recover. If not, defendants should prevail."

The facts in the *Berryman* case, the *Johnson* case, and the *Patten* case, *supra,* are entirely different to the facts in this case and the law applicable in those cases does not, and cannot, apply in the case at bar. In those cases transfers were made by the holders of the certificates of purchase without the knowledge or consent of the Commissioners of the Land Office. The terms and conditions of each Certificate of Purchase, insofar as the State was concerned, were fully complied with and all payments made. After the last payment was made, in each case, a patent was issued and no question as to the right of the holder of the Certificate of Purchase to sell an interest in such property and vest such interest as against the State was presented or even raised in the trial court or in the Supreme Court of the State of Oklahoma.

In this case, as previously stated, the transfers were made by the holders of the Certificates of Purchase but the terms and conditions of the Certificates of Purchase were broken; the payments were not made, and the Certificates of Purchase were cancelled. No interest could be created by the holders of the Certificates of Purchase that would vest as against the State of Oklahoma. In this connection

we call the Court's attention to the cases cited on page 10 of the Petition for the Writ.

In the *Patten* case, the transfer was also made by the holder of the Certificate of Purchase without the knowledge or consent of the Commissioners and we find the Supreme Court of the State of Oklahoma holding "a purchaser is entitled to possession, rents and profits, and against all of the world except the State, he is to be treated as the owner." This wording is taken from the first syllabus. The second syllabus holds that the purchaser of school land has a right to transfer an interest in the land prior to the delivery of a patent. If these two statements taken from the syllabus in the *Patten* case are reconciled, taken together they could only mean that the holder of the Certificate of Purchase has a right to transfer an interest before delivery of the patent but that such transfer would not within itself vest any interest, right or title as against the State of Oklahoma and would not be binding on the State of Oklahoma.

Following the wording above, if the holder of the Certificate of Purchase is not the owner as against the State of Oklahoma, could he by the execution of an instrument convey an interest in the land, or any portion thereof, and bind the State of Oklahoma by such transfer or vest any interest in such land as against the State of Oklahoma?

A careful reading of all three of these cases discloses that the Supreme Court of the State of Oklahoma has never held that a transfer of mineral rights by the holder of a Certificate of Purchase conveys a vested interest as against the State of Oklahoma unless such transfer has the ap-

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proval of the State. To the contrary, referring back to the wording quoted from the *Patten* case, as against the State of Oklahoma no interest could vest under the conditions, circumstances and facts of the case at bar.

We call the Court's attention again to the case of *Lucia v. Schaefers et al.*, 109 Okla. 167, 233 Pac. 444, wherein the Supreme Court of this State held with reference to transfers of Certificates of Purchase "must be approved by the Commissioners of the Land Office."

It will be noted that the trial court and one member of the panel hearing this case on appeal did not consider the *Berryman, Johnson* and *Patten* cases controlling or even applicable. The same two also held that no vested interest as against the State of Oklahoma was obtained by the Magnolia Petroleum Company.

To permit the decision of the United States Court of Appeals, Tenth Circuit, to stand would mean the loss of trust property not only to the trustees and the beneficiaries but also the trustor, the United States Government.

We again submit a compelling case is presented for the exercise of this Court's certiorari jurisdiction.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
First Assistant Attorney General;

R. H. DUNN,
Attorney for Commissioners of the Land Office;

A. M. DEGRAFFENRIED,
Attorney for Commissioners of the Land Office,

Attorneys for Petitioner,
State Capitol Building,
Oklahoma City, Oklahoma.

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